

STANDING COMMITTEE ON ADR PROGRAMS

Notes- Meeting of January 27, 1998¹

Huntington Beach, CA

Attendees

Chief Judge Procter Hug, Jr.
Judge Dorothy Nelson, *Committee Chair*
Chief District Judge Michael Hogan
Mr. Gregory Walters
Ms. Le Parker Kelleher
Mr. Chuck Loughran, *Committee Staff*

Participating via telephone

Judge William Dwyer
Chief Bankruptcy Judge Louise De Carl Adler
Judge Barry Russell
Judge Wayne Brazil
Judge Nancy Fiora
Mr. David Lombardi
Mr. Philip Cutler
Mr. Bruce Meyerson

The meeting began at approximately 4:00 PM. Committee Chair, Judge Nelson, took a roll call of all committee members. Chief Judge Hug welcomed the members of the committee and thanked them for agreeing to carry out the important work of the committee.

Self Introductions

Each member of the committee was invited to describe his or her ADR experience and the aspects of ADR that were of greatest interest. Each did so. In addition to these descriptions the following comments and observations were made in this part of the meeting:

- ⇒ Judge Dwyer observed that private mediation (by retired judges and others) has become an explosive growth industry and he stressed the importance of making mediation an integral part of the court system;
- ⇒ Judge Brazil explained that one of the more serious dilemmas in his district (N.D. CA) in using volunteer lawyers as ADR specialists is conflicts of interest that arise when a lawyer acts as an ADR neutral involving parties who he or she or their firm might otherwise represent or oppose in litigation.
- ⇒ Judge Fiora's commented that the multitude of criminal and immigration cases in her district (AZ) has so overwhelmed the magistrate judges that there is little participation by them in ADR. Arizona is one of the ten districts participating in a pilot program utilizing court-annexed arbitration.
- ⇒ Judge Adler, Mr. Cutler and others opined that mediation (primarily by volunteer members of the bar) has become the dominant form of ADR and that arbitration has become relatively insignificant as an ADR technique.
- ⇒ Ms. Kelleher described prisoner mediation in her district (ID) as well as in the Eastern and Western Districts of Washington, and she reported on recent rejoinder to the Rand study on CJRA mediation.
- ⇒ Judge Nelson discussed the value of each committee member receiving a subscription of the ABA publication, *Dispute Resolution Journal*. **Mr. Meyerson agreed to look into it, and staff was requested to arrange for subscriptions for**

¹ Action items are shown in **bold type**

all committee members. There was also discussion of an FJC study of federal circuit mediation programs, which staff was directed to obtain and provide to committee members.

Status of ADR Programs in the Ninth Circuit

A matrix summary of ADR programs in the bankruptcy courts as they existed in 1996 was included in the meeting agenda materials and comparable information for district court programs was faxed to committee members just prior to the meeting. Data for circuit mediation was not included. **[A copy of the most recent report on the Ninth Circuit mediation program will be forwarded to the committee well in advance of the next committee meeting]**

Due to time constraints, this material was not discussed. **Committee members are urged to review the data on their own prior to the next meeting.**

Mission Statement

Judge Nelson read the list of items on the draft mission statement, and asked if there were any additional items any members wished to add. Judge Brazil stressed the critical nature of funding for ADR programs, and the inflexible formula being adopted by the U.S. Judicial Conference for courts which do not yet have well-established programs.² He cited as one example the difficulties being experienced by the District of Nevada in retaining existing ADR positions. He suggested that the last bullet item of the mission statement be broadened so as to include prospective actions to support adequate ADR funding to be taken on a national level. Mr. Meyerson recommended that the committee extend its efforts through bar associations and others to encourage greater use of ADR. In this regard he suggested a greater scope be described under the third bullet of the mission statement. **[Draft revisions in these two bullet points will be prepared for discussion at the next committee meeting]**

The value of having an adequate information base regarding ADR programs, techniques, research, etc. was discussed, and several sources of information were identified including the *National Center for State Courts*, ABA, *Ohio State University (Professor Nancy Rogers and her project for state courts)*. **Staff was directed to make the necessary contacts and obtain information related to ADR programs.**

² A recommendation is being made by the Judicial Resources Committee of the U.S. Judicial Conference for its meeting in March, 1998 is to establish a funding formula of 2.17 hours per ADR case for virtually all courts in the U.S. (including all courts in the Ninth Circuit except the N.D. California). A copy of that recommendation and rationale is enclosed with these notes. [In a discussion following the meeting, Chief Judge Hug related that, based on his previous experience as a member of the Judicial Resources Committee, there is considerable resistance on a national basis to funding ADR staff positions in the courts. **He recommended that the committee keep Chief Judge Marilyn Huff (S.D. CA) appraised of its concerns regarding funding since she is now the sole Ninth Circuit judge on that committee.**

Possible Committee Projects and Activities

Judge Nelson directed the members' attention to the list of possible committee activities and projects, and inquired if any members wished to identify what they felt were "burning issues" for which the committee might establish priority consideration. In response to her invitation, the following matters were discussed:

- ⇒ Judge Adler said that it is vital to determine which ADR techniques are most effective. She recommended that the committee seek to evaluate the relative merits of mediation, ENE and arbitration. Mr. Lombardi felt that the problem in doing so was obtaining sufficient funding to study that question. Judge Adler suggested that formal statistical studies were not required, but that informal, anecdotal information could be sufficient to lead the courts in the Ninth Circuit in the right direction. Judge Nelson agreed that pure statistics don't tell the whole story. Judge Adler believes that "customer satisfaction", i.e., whether the parties value the process, is a key in evaluating performance of ADR programs. In this context Judge Brazil mentioned a study of the N.D. CA ADR program by Rosenberg and Fulberg as being relevant to the customer satisfaction issues. **[staff will obtain a copy of that study]** Mr. Lombardi explained that his program requests all parties to complete a questionnaire following each mediation. Judge Russell mentioned a project that was underway in conjunction with Pepperdine University to evaluate the ADR program in the bankruptcy courts in the Central District of California.
- ⇒ Mr. Meyerson expressed the belief that there is a significant amount of data already in existence establishing the effectiveness of mediation in resolving disputes. He believes the committee should focus on assisting those districts that are not using mediation.
- ⇒ Chief Judge Hogan stressed the value of developing model local ADR rules, forms and procedures to guide courts in establishing and improving their ADR programs. He observed that a number of districts in the Ninth Circuit have successful ADR programs, and that the thrust should be to replicate those successes.
- ⇒ Judge Nelson reminded the committee members that with limited staff and resources this committee could not be all things to all people, and that it would be important for the committee to identify 2-4 priority projects on which to focus its energy and resources. This could be a principal topic of discussion at the committee's next meeting.

Next ADR Committee Meeting

Judge Nelson invited the committee members to come to the Pasadena Courthouse for the next committee meeting. There was discussion as to which days of the week are or are not most

convenient. The consensus was that Fridays are generally the best. However, Judge Dwyer and Mr. Cutler favored a day on which they wouldn't have to take court/work time for travel. With that in mind Judge Nelson proposes to start the meeting around 12:30 PM on a Friday, including lunch as part of the meeting, and adjourning about 3:30 PM to permit Judge Dwyer and Mr. Cutler (and others from more distant locations) to attend the meeting with only one day away from their regular obligations. [Following the meeting Judge Nelson identified those Fridays in the coming months on which she would be available] **Accompanying these notes is a response form regarding availabilities which all committee members are asked to complete and return via fax to Chuck Loughran]**